

COMMITTEE ON SUPERIOR COURT MINUTES

Friday, November 2, 2012

Conference Room 345 A/B

State Courts Building, 1501 W. Washington, Phoenix, AZ 85007

Present: Judge Eddward Ballinger, Judge James Conlogue, Judge David Cunanan, Judge Robert Duber II, Judge Steven Fuller, Judge Charles Gurtler, Sue Hall, Judge Charles Harrington, Michael Jeanes (proxy for Patricia Noland), William Klain, Judge Kenneth Lee, Judge Colleen McNally, Judge Michala Ruechel, Judge Monica Stauffer, Judge Randall Warner, Susan Wilson.

Present Telephonically: Judge Richard Gordon, Joshua Halversen.

Absent: Judge Celé Hancock, Tim Hardy, Judge Carey Hyatt, Judge Joseph Lodge, Judge David Mackey.

Guests: Patrick Scott (AOC), Jerry Landau (AOC), Brian Pollack (Lewis & Roca, LLP), Melinda Hardman (AOC), J.L. Doyle (AOC), Jennifer Jones (AOC), Anne Hunter (AOC), Mark Meltzer (AOC), Cameron Janati (Arizona Association of Certified Process Servers).

Staff: Kay Radwanski (AOC), Kym Lopez (AOC).

I. REGULAR BUSINESS

A. Welcome and Opening Remarks

With a quorum present, the November 2, 2012, meeting of the Committee on Superior Court (COSC) was called to order at 10:03 a.m. by Judge Colleen McNally, acting chair. Judge McNally welcomed Michael Jeanes, proxy for Patricia Noland.

B. Approval of Minutes

The draft minutes from the September 7, 2012, meeting of the COSC were presented for approval.

Motion: Judge James Conlogue moved to approve the September 7, 2012, meeting minutes as presented. **Second:** Judge Steven Fuller. **Vote:** Unanimous.

II. BUSINESS ITEMS/POTENTIAL ACTIONS ITEMS

A. Legislative Update

Jerry Landau, AOC government affairs director, reported on 2013 legislative proposals. Mr. Landau highlighted the following proposals:

Post-conviction relief (Maricopa County Superior Court) (affecting Title 13)

In a capital post-conviction relief case, the court is required to approve all reasonable attorney fees and costs for appointed counsel. Current law requires approval of

attorney fees for over 200 hours of work. The court may appoint a designee to review and approve the fees and costs. The Arizona Judicial Council has approved moving forward.

A member raised concerns as to the need for a statute and the limitation on judicial discretion. Mr. Landau stated that the main part of the statute is the fee, which is not touched by this change. He agreed that a statute is not required for approval of the attorney's work but noted it is simpler to correct or modify a process rather than to repeal a statute.

Probate omnibus (Administrative Office of the Courts) (affecting Title 14)

In a guardianship or conservatorship case, this bill permits the superior court to order alternative dispute resolution or arbitration prior to the appointment of a fiduciary. It removes the statutory requirement that the conservator's annual accounting be filed with the court on the anniversary of the date the person qualified as conservator, and it permits the court to order fingerprints and background checks of proposed guardians and conservators and sets forth the necessary process.

Criminal code; conforming changes (Criminal Justice System) (affecting Titles 8 and 13)

This adds a definition of "criminal offense" to include all felonies, misdemeanors, and violations of a local criminal ordinance to the victim's rights provisions of Title 8 (juveniles) to conform to the changes in the Title 13 victim's rights definition enacted last session. In the criminal code definition of "historical prior felony conviction," referring to out-of-state convictions, it changes the language "use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of death or serious injury" to the term "dangerous offense" in order to conform to other provisions of the criminal code. Rounds two criminal code sentencing provisions in the category one repetitive conviction subsection, Class 6 mitigated (.3 years to .25 years), Class 6 maximum (1.8 years to 2 years) and rounds one sentencing provision in the category two repetitive offender subsection, Class 3 mitigated (3.3 years to 3.25 years) in order to conform to other portions of the sentencing code where the sentencing ranges are in full, half or quarter years.

Mr. Landau requested feedback on the proposal to move sentences to half-year increments instead of quarter-year increments. This change would promote uniformity and simplicity in sentencing.

Motion: Judge Robert Duber moved to consider the first two proposals separately. **Second:** Judge Monica Stauffer. **Vote:** Unanimous.

Motion: Mr. Jeanes moved to accept the first post-conviction relief proposal. **Second:** Judge Michaela Ruechel. **Vote:** 14-3, with one abstention.

Motion: Mr. Jeanes moved to accept the second probate omnibus proposal. **Second:** Judge Conlogue. **Vote:** Unanimous.

B. Rule Petition Case Management and Trial Settings

Brian Pollock, Lewis & Roca, LLP, and William Klain presented for discussion a draft petition to revise the Rules of Civil Procedure regarding case management and trial settings. The draft petition has not yet been approved and adopted by the State Bar, but if the Board of Governors authorizes it, it will be filed as a Rule 28 petition with the Arizona Supreme Court in January 2013. The Supreme Court would then consider the petition at its annual rules agenda in late summer 2013.

Mr. Klain said the inactive and active calendar trial settings have run their course in terms of usefulness and in reflecting the reality of today's practices. The draft petition, he said, proposes a better way to consult with judges and practitioners and to implement sound case management policies and procedure. Mr. Pollack offered the proposal for informational purposes and asked members to circulate it in their communities and benches around the state for comments.

The substantive changes would affect Rules 16, 38.1, and 37 regarding case management and trial setting. Motions to Set and Certificates of Readiness would be replaced by a system requiring parties to meet and confer regarding case management. The parties would propose a scheduling order for the judge's consideration. The Active Calendar would be eliminated, and trial dates would be set during a trial setting status conference. Absent exceptional circumstances, parties would have to participate in settlement conferences or mediation before getting a trial setting. The Inactive Calendar would be kept in place but would be renamed the "Dismissal Calendar."

A provision was included in Rule 16(b) to ensure that parties cannot use the scheduling order procedure to lengthen the amount of time for discovery or to circumvent disclosure rules. The scheduling order rules include deadlines for service of initial disclosure, expert disclosure, propounding of written discovery, disclosure of non-experts, completion of expert depositions and discovery, final supplementation of Rule 26.1 disclosures, and a deadline for holding a Rule 16.1 settlement conference or private mediation.

The following questions were addressed:

- In the absence of a joint scheduling order, is the court required to provide any notice or does the case go onto the dismissal calendar without further notice? Mr. Pollack stated the court must provide notice. Recent case law, American Asphalt v. CMX, says that the notice must be contemporaneous; in other words, when the case is placed on the Inactive Calendar (or the Dismissal Calendar as proposed), notice must be given. The proposed rule change would not alter that.
- Do these changes give more control over case management to lawyers and less control to judges? Mr. Pollack explained that control remains with the court to the extent that the court wants to exercise that control. Mr. Klain stated that proposed

Rule 16(f) says that absent exceptional circumstances, a trial date shall not be set unless until the parties certify they have engaged in good faith in a settlement conference or private mediation.

- What is the practical difference for parties who wait until a case goes on the Dismissal Calendar and then move right before the deadline for a Rule 16 conference? Case law requires a showing of good cause to avoid dismissal. According to Mr. Pollock, under the rule change, the middle step would be skipped and instead a scheduling order would be proposed. Without a showing of good cause, whether the proposed scheduling order is submitted five months or nine months after the case has commenced, the schedule should have a deadline for completing discovery 13 months after the filing of the case.
- With the rule change, would the model time standards that Arizona may adopt be able to be met? Mr. Pollock said the proposal does not take away the court's ability to set a Rule 16 scheduling conference. The scheduling order put in place early in the case would not have a trial date; it would have a trial setting status conference date to set the trial.
- Would a court have to touch every civil case filed each year, rather than the small percentage that currently reach the Motion to Set stage? Most cases are either settled or dismissed within nine months, with the court having to handle only cases with Motions to Dismiss. Mr. Pollock stated that compulsory arbitration will continue as it does currently, scheduling orders would not be done, and that if a party appeals, Rule 77 would govern. If 90 percent of cases are resolved within a nine-month period and many of those cases are under the proposed rule change, they will be resolved in the same way without a scheduling order ever being submitted to the court. A specific percentage cannot be determined at this time.

Mr. Pollock asked members to contact either Mr. Klain or him with suggestions or issues with specific parts of the proposal for discussion in a more informal process. He noted that if a rule petition is filed, the State Bar will request a staggered comment period.

Judge Harrington voiced opposition based on the increase in costs, the changes in the court's case management system and the number of cases a judge would have to touch.

Judge Lee noted that although he is now a member of the State Bar's Civil Practice and Procedure Committee, he was not a CPPC member when the proposal was drafted. He said he has concerns about the proposal and wanted it to be understood that he did not participate in its drafting.

Judge Ballinger commented that the consensus appears to be that COSC does not support the proposal as written and he would like that position to be communicated to the Board of Governors. Mr. Pollock said he would share those concerns as the

Board of Governors was aware of the presentation to COSC and would be expecting a report. Mr. Pollock thanked members for their comments, noting that while there is opposition, the feedback is appreciated.

C. Adult Intensive Probation Evidence-Based Practices

J. L. Doyle, AOC Adult Probation Services, presented a proposed revision to ACJA § 6-202.01. The proposal will add supervision contact levels for adult probation departments using the waiver (ARS § 13-919), add criteria for the AOC to consider in granting a waiver request, and eliminate redundancy and consolidate subsections that had been repeated through the code section. Contact levels under the waiver mirror the contact levels under two-person teams. The proposal was available for public comment for 30 days, and no negative comments were received. The Committee on Probation unanimously approved the proposal as written.

Ms. Doyle explained that departments currently have no criteria by which to deny a waiver. A department can deny a waiver and have a reason, but the reason can always be challenged. The department is trying to set parameters that make sense, infuse evidence-based practices, and to supervise offenders based on risk and need.

Motion: Judge Conlogue moved to approve the revision as written. **Second:** Judge Charles Gurtler. **Vote:** 15-1.

D. Private Process Servers

Anne Hunter, AOC Certification and Licensing Division, discussed proposed changes to ACJA § 7-204 (Private Process Servers) and § 7-205 (Defensive Driving).

The proposed amendments to ACJA § 7-205 contain provisions regulating defensive driving schools and instructors, including certification requirements, codes of conduct, fee schedules, and continuing education policies. They establish certification and curriculum requirements for a teenage driver school and guidelines for judges to use when considering a request for a law enforcement officer to be certified as a defensive driving instructor. The proposal also establishes advertising restrictions, adds language clarifying the process for positively identifying students enrolled in an on-line class, and adds language clarifying the appropriate appearance and format of fees on schools' websites. The proposed amendment also increases the reinstatement application fee from \$100 to \$1,000 for a defensive driving school and eliminates the requirement that an instructor teach a minimum number of classes during a certification renewal cycle. Finally, the amendment deletes the fee distinction in regard to the length of time from initial certification to renewal.

Stakeholders, including school owners, the Defensive Driving Board, and the board's rules subcommittee have reviewed the proposal. The proposed changes are currently posted on the website for public comment and will be posted for 30 days, ending on

November 9, 2012. The Limited Jurisdiction Court Committee (LJC) voted to recommend to the Arizona Judicial Council (AJC) to adopt the proposal as written.

During discussion, Ms. Hunter noted that:

- Classes for teens will be in-person, discussion-type classes.
- Defensive driving schools are not restricted to in-state providers only.
- There are no requirements nor are there any reports on the differences between on-line learning versus classroom learning. A member noted that justices of the peace have received comments that the on-line schools are more effective because students must pass a test and retake it if they fail. Students who attend the classroom do not have to take a test and reportedly have spent the time reading newspapers or sleeping.
- The definition of an instructor is the same for both on-line and in-classroom schools, although on-line classes are more of a curriculum. However, students can submit questions on-line that will be answered by certified instructors.
- There has been discussion about fingerprinting instructors because they may be teaching minors, but no policies have been finalized yet.

Motion: Judge Ruechel moved to adopt. **Second:** Judge Conlogue. **Vote:** Unanimous.

Proposed amendments to ACJA § 7-204, regarding private process servers, incorporate best practices in the regulatory arena, including residency requirements, factors to consider when reviewing an application for certification, and disciplinary sanctions. These changes have been reviewed and discussed among stakeholders, including private process servers, the courts, and the Arizona Association of Certified Process Servers. The proposal has been circulated for public comment and will be forwarded to AJC for review.

LJC recommended that the amendments include a pre-certification training requirement. This also was mentioned in the public comments. Ms. Hunter said pre-certification training was considered; however, it is believed that the examination given is adequate to assess the knowledge and the skills of a private process server. Once certified or licensed, there is a requirement for annual continuing education credit. Ms. Hunter noted that LJC voted to reject the proposed additions to section (E)(5)(b)(4). This additional language was modeled after section 7-201, General Requirements, and was included in the proposed changes in order to align this program better with other regulated professions. It also will be better aligned with ARS § 13-904(e), which states that a person whose civil rights have been restored may not be disqualified for certification solely because of a prior conviction of a felony or misdemeanor unless the offense has a reasonable relationship to the functions of the employment or occupation for which the licensed permit or certificate is sought.

Cameron Janati, Arizona Association of Certified Process Servers legislative liaison, asked for removal of any proposed revision that would distance the professional

community from the best representation they provide to the courts, the legal profession, and the public daily. Mr. Janati asked members to strongly consider dismissal of the following proposed changes to section 7-204: 1) omitting required references in application materials; 2) eliminating the residency requirement; 3) requiring documentation of continuing education activity that is comprised of eight or more hours in one day; and 4) easing conditions for a convicted felon to become a certified process server. The association also feels pre-certification training is needed.

Discussion ensued regarding:

- The ability of a convicted felon to become a process server. It was suggested that if a felon's rights have been restored, the judge should consider whether there is a relationship between the felony and the ability to be a process server. This is addressed in ACJA § 7-201(B)(4).
- Removal of the requirement to provide references. Mr. Jeanes, who participated on the committee that developed the proposal, said the value of the references was questioned as the applicant is the one who decides which references to submit.
- Pre-certification training. Mr. Jeanes said the committee found pre-certification training unnecessary if an applicant had the ability to pass the test to become a process server. He said pre-certification creates a burden for the courts, the Clerks, and the AOC. The AOC would have to review the curriculum and certify the classes as is done for defensive driving school, and the Clerks would then have to make sure the training had been completed.
- Procedures for retaking the test upon failure. Mr. Jeanes explained that there is a process for taking the test and procedures for retaking it. Retakes are limited, and different versions of the test are given. A person may take the test a second time, but a third attempt requires the approval of the presiding judge.
- Out-of-state and in-state residency. Mr. Jeanes said the committee did not believe it was appropriate to limit certification to only in-state individuals. In rural areas, particularly those that border other states, there may be no certified process servers in Arizona. However, there may be process servers nearby in the border states. A judge's authority over the process server, regardless of the person's residence, is the same if the person is certified in Arizona under Arizona code.

Motion: Mr. Jeanes moved to adopt the proposal as drafted. **Second:** Judge Lee. **Vote:** Unanimous.

E. Changes to the 2012 Minimum Accounting Standards Checklist

Jennifer Jones, AOC Court Services Division, highlighted changes to the 2012 Minimum Accounting Standards (MAS) checklist. MAS E.1 requires each court and court department that handles money to complete the Annual MAS Compliance Checklist. Courts are encouraged to submit the checklist in electronic format. The required checklist will be posted on the Arizona Judicial Branch website in mid-December.

F. Advisory Committee on Supreme Court Rules 123 and 125

Melinda Hardman, AOC Court Services Division, and Kay Radwanski, AOC Court Services Division, updated COSC members on the Advisory Committee on Supreme Court Rules 123 and 125. At its October 18, 2012, meeting, the committee authorized its chair, Mike Baumstark, to file a rule change petition affecting Rule 123. The petition will request changes regarding family law minute entries and protective orders. The committee is not recommending any changes regarding access to probate and mental health records. The committee's report, which is in rule petition form, will be presented to AJC on December 13, 2012. A draft of the appendix to the petition was presented for review and comment by COSC members.

Discussion ensued regarding:

- A preference for ruling from the bench to avoid having to generate an order and the protocol for exhibits. Ms. Radwanski said the change to Rule 123 covers only minute entries, which include orders from the bench. Documents and exhibits are not posted online.
- Changes in technology for counties that post all minute entries online. Mr. Jeanes said, Maricopa County will change its practice of posting all minute entries, both in-court and under-advisement rulings by December 31, 2012. Under-advisement minute entries will go in a separate track and will not be posted online, but minute entries for matters decided in court will be posted online. This process will not change a judge's access to minute entries nor will it affect the work process between the superior court and the Clerk's Office.

G. Recommendations of the Committee on the Impact of Wireless Mobile Technology and Social Media on Court Proceedings

Mark Meltzer, AOC Court Services Division, reviewed the committee's report and recommendations it will propose to the AJC in December 2012. The committee has drafted revisions to the jury admonition, a new proposed Supreme Court Rule 122.1 that describes permissible uses of portable electronic devices in the courtroom and courthouse, and revisions to Supreme Court Rule 122 concerning the use of cameras in the courtroom. The proposed rules have been presented to the Committee on Limited Jurisdiction Courts, the Commission on Victims in the Courts (COVIC), the Association of Superior Court Administrators, and the presiding judges.

Discussion ensued regarding:

- Concerns that the proposed changes diminish a judge's ability to manage the courtroom and are too "one size fits all."
- Defining "journalist" and understanding why the Rule 122 allows journalists to be treated differently than other segments of the population. It was noted that differentiating between journalists and bloggers can be difficult. Mr. Meltzer stated that Rule 122(m) remains because the professional media wanted explicit authorization for journalists to use personal audio recorders in the courtrooms.

Rule 122.1 permits the public to use portable electronic devices to retrieve or store information and that could include audio recording. A member suggested changing the word “journalist” to “person,” which would give journalists explicit authority as they would then be encompassed within the definition of a person. Mr. Meltzer noted the suggestion and will take it back to the committee. It also was suggested that the phrase “unless otherwise prohibited” be added. Without that restrictive phrase, the rule could be read to allow the recording of a juvenile hearing.

- The prohibition on photographing the prosecutor, jurors, and others. Mr. Meltzer said a provision will be added to Rule 122.1(c). A question was asked regarding responsibility for removing a prohibited photograph from social media. Mr. Meltzer said the person who took the photograph would be responsible for removing it, and the court has oversight to ensure that the photograph is removed. However, a photograph can be deleted on a device but still reside on a remote server, in a cloud, as an email attachment, or may have been posted on an Internet page. The court, through appropriate questioning of the person who took the photograph, can determine whether the photo has been removed. It was suggested that the court advise a person who takes a prohibited photo that if the court subsequently learns that the person was not truthful and the photograph is still available, the person can be found in contempt.

Motion: Mr. Jeanes moved approval and asked Mr. Meltzer to take COSC’s comments to the full committee on November 7, 2012. **Second:** Mr. Klain.
Vote: 14-2.

H. Report: Supreme Court’s 2012 Rules Agenda Meeting

Mr. Meltzer reviewed action taken by the Supreme Court at its 2012 Rules Agenda meeting. The minutes are available online, and but for one exception, the effective date of these newly adopted rules and rule amendments is January 1, 2013.

It was noted that the State Bar has filed a petition to amend ARCAP Rule 9 to temporarily suspend an appeal and revest jurisdiction in the trial court, allowing it to address administrative acts that need to be completed before the appeal can proceed.

I. State Bar Family Law Practice and Procedure Committee – Proposed Rule 28 Petitions

Because of miscommunication over the time for his presentation, Tom Alongi, chair of the State Bar’s Family Practice and Procedures Committee, was unable to deliver his presentation.

III. OTHER BUSINESS

- A. Next Meeting:** Friday, February 1, 2012, 10:00 a.m. – 2:00 p.m.
Arizona State Courts Building, Conference Room 119 A/B

B. Good of the Order/Call to the Public
None

Adjourned at 1:18 p.m.